

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

20-CR-29 (RJA-HKS)

vs.

DAVID WASHINGTON  
and DAVID BURGIN,

Defendants.

Buffalo, New York  
January 25, 2024

-----x  
**ORAL ARGUMENT**

TRANSCRIPT OF PROCEEDINGS  
BEFORE MAGISTRATE JUDGE H. KENNETH SCHROEDER, JR.  
UNITED STATES MAGISTRATE JUDGE

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(Proceedings recorded by electronic audio recording,  
transcript produced by computer.)

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P R O C E E D I N G S

\* \* \*

(WHEREUPON, Defendant Burgin present.)

**THE CLERK:** This is United States v. David Washington and David Burgin, docket number 20-CR-29.

This is the date set for oral argument on supplemental motions.

Assistant United States Attorneys Timothy Lynch and Evan Glaberson appearing on behalf of the government.

James Harrington and Donald Thompson appearing with David Burgin.

**MAGISTRATE JUDGE SCHROEDER:** Good morning.

**MR. HARRINGTON:** Morning, Judge.

**MR. THOMPSON:** Morning, your Honor.

**MAGISTRATE JUDGE SCHROEDER:** I understand that Mr. Foti and Mr. Washington are not appearing?

**MR. LYNCH:** Judge, I can report on that.

I spoke to Mr. Foti just a few minutes ago and he indicated to me that he had checked the calendar and he didn't see the case on. That's what he said, and he apologized to the Court. Otherwise, he would have been here, so -- and his client would have been here.

I think Mr. Harrington had a request to the Court, also. Mr. Foti indicated that he would be available to

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1 reschedule for December 9th -- I'm sorry, February 9th.

2 **MAGISTRATE JUDGE SCHROEDER:** I'm bewildered. How could  
3 he not know it was on the calendar if we've been messing with  
4 this situation for months?

5 **MR. LYNCH:** Yeah, that you'll have to ask him when he  
6 arrives on February 9th. He said he was going to communicate  
7 something to the Court, I assume by letter.

8 **MAGISTRATE JUDGE SCHROEDER:** Mr. Harrington.

9 **MR. HARRINGTON:** Judge, the government and we were ready  
10 to argue today but I, we got a response from the government  
11 on Monday which, which is when it was due and they raised a  
12 couple issues there that we feel -- we could talk about them  
13 orally but we think it would be helpful to give you something  
14 in writing from us in response to those.

15 But, in addition to that, we submitted a long list of  
16 factual things that we're asking the Court to make findings  
17 on because --

18 **MAGISTRATE JUDGE SCHROEDER:** Some of which the  
19 government says it's --

20 **MR. HARRINGTON:** Right.

21 **MAGISTRATE JUDGE SCHROEDER:** Willing to --

22 **MR. HARRINGTON:** Right.

23 **MAGISTRATE JUDGE SCHROEDER:** -- agree to which causes me  
24 to say why not just enter into a stipulation of facts?

25 **MR. HARRINGTON:** Well, we may. But that leads to the

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1 next part of that which is some of the things that they've  
2 already agreed to, I've realized have some inaccuracies so  
3 that we need to make sure that if we stipulate or if you  
4 approve it, that it's completely accurate.

5 So, we've agreed that I will meet with Mr. Lynch and Mr.  
6 Glaberson next week and we will go through them all together  
7 and I think we can reach accord on almost all of them.

8 And then in the meantime, we can prepare our response to  
9 this. And if the government approves -- or if the Court  
10 approves, we agreed we would come back on February the 9th.  
11 Our reply would be filed on February the 7th, if that's all  
12 right with the judge.

13 **MAGISTRATE JUDGE SCHROEDER:** Before you spend a lot of  
14 time, you and Mr. Lynch, on this so-called stipulation of  
15 facts, I'm still somewhat misunderstanding, I guess, as to  
16 why we have to get into that kind of detail when I've already  
17 indicated that, as far as I'm concerned, the search at 56  
18 Grimes on February the 19th, 2020 was illegal.

19 **MR. HARRINGTON:** Well, Judge, while we agree with you --

20 **MAGISTRATE JUDGE SCHROEDER:** And --

21 **MR. HARRINGTON:** -- wholeheartedly --

22 **MAGISTRATE JUDGE SCHROEDER:** And so whether a door was  
23 locked or wasn't locked or whether a stairway went from the  
24 office to the attic or went from a bedroom to the attic, to  
25 me, I fail to see any significance as to that kind of detail

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1 when I've indicated just being on the second floor of the  
2 building was invalid and illegal.

3 **MR. HARRINGTON:** Judge, unfortunately, from the defense  
4 side, we know that there are people above you on a number of  
5 levels --

6 **MAGISTRATE JUDGE SCHROEDER:** What, you think they  
7 wouldn't listen to me?

8 **MR. HARRINGTON:** -- who may not agree with you and we  
9 want to make sure we have other bases for them to consider,  
10 in the event that they should improperly disagree with you.

11 **MAGISTRATE JUDGE SCHROEDER:** No, I understand that.

12 But then it just comes down to the issue, as I see it,  
13 of the first search warrant in question said it was  
14 authorizing a search of the lower front of 56 Grimes. It's  
15 indisputable, based on the testimony at the hearings, that  
16 the agents went up on to the second floor before they had a  
17 second search warrant.

18 So, even if some higher court -- although it's hard to  
19 imagine -- but even if they were to disagree with me and my  
20 finding as to the second search warrant and its invalidity  
21 and the activities of the law enforcement personnel in going  
22 to the second floor without a search warrant, it seems to me  
23 the only issue is what was authorized in the first warrant?  
24 And that was an entry and search in the lower front, period.  
25 Whether doors were locked or whether there were offices

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1 upstairs or bedrooms upstairs or apartments upstairs was  
2 irrelevant.

3 **MR. LYNCH:** Well, Judge, you know, again, we've --

4 **MAGISTRATE JUDGE SCHROEDER:** I know you disagree with my  
5 Report and Recommendation.

6 **MR. LYNCH:** Right, because the defendant does have -- I  
7 mean, the defendant has a burden to establish reasonable  
8 expectation of privacy that's objectively and subjectively  
9 reasonable but --

10 **MAGISTRATE JUDGE SCHROEDER:** Let me interrupt you there.  
11 One, if I recall, an affidavit was filed by Mr. Burgin  
12 saying he had an office up there and he utilized that  
13 apartment up there. His mother owned the building and we had  
14 testimony from Mr. Burgin himself indicating that --

15 (Extraneous noise.)

16 **MR. LYNCH:** True, Judge, and I understand that. But we  
17 may -- we articulated at least four grounds why we thought  
18 that, based on the law, that there were reasonable challenges  
19 to his, his claim in that regard and some of it had to do  
20 with, you know, the multiple access -- there were multiple  
21 people who had access to the facility. It was a commercial  
22 premises. The defendant, you know --

23 **MAGISTRATE JUDGE SCHROEDER:** Wait a minute. Wait a  
24 minute. Who had multiple access of the second floor? Only,  
25 as I recall the testimony of everybody that testified, it was

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1 Mr. Burgin and that tenant in the front --

2 **MR. LYNCH:** So --

3 **MAGISTRATE JUDGE SCHROEDER:** -- and the mother who owned  
4 the building.

5 **MR. LYNCH:** Right. And Mr. Pierce because we know he  
6 had the keys.

7 **MAGISTRATE JUDGE SCHROEDER:** Well, no, the evidence  
8 only -- relating to Mr. Pierce was he was seen going in and  
9 out of the front door of 56 Grimes and that's why the  
10 warrant, the first warrant said "lower front".

11 **MR. LYNCH:** I think the defendant said Mr. Pierce had  
12 it. His own testimony was Mr. Pierce had it, his  
13 brother-in-law had it, quote, unquote, anyone who has been  
14 there in the last 22 years might have access. He didn't know  
15 because he didn't own the building.

16 But then if we even assume Mr. Loman exists, we know  
17 that the key to the front landing of the second floor was the  
18 same key that you used to enter the back landing on the  
19 second floor. So if you had access to the front area, you  
20 had access to the back area. And so our point was that whole  
21 area -- they're not separate. It's all one, one continuous  
22 location. And he said there were locked doors but our  
23 photographic evidence demonstrates there were no locked doors  
24 inside the second floor premises.

25 And so those were reasonable challenges we made that the

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1 R and R didn't address. And so that's what -- that's really  
2 what -- I mean, principally, we will be objecting on the  
3 grounds that the Court didn't adequately consider the burden  
4 that the defendant had to come forward with by a  
5 preponderance of the evidence that he had a reasonable  
6 expectation of privacy. That's the first thing.

7 **MAGISTRATE JUDGE SCHROEDER:** Well --

8 **MR. LYNCH:** The second thing is --

9 **MAGISTRATE JUDGE SCHROEDER:** Well, wait.  
10 The entire second floor circumstance was conducted  
11 illegally --

12 **MR. LYNCH:** Okay.

13 **MAGISTRATE JUDGE SCHROEDER:** -- in my R and R.

14 **MR. LYNCH:** Right. But if he doesn't have a reasonable  
15 expectation of privacy in the second floor, then it doesn't  
16 matter.

17 **MAGISTRATE JUDGE SCHROEDER:** But he testified that he  
18 utilized that apartment. He testified that he had an office  
19 there. There was nothing put forth before Judge Case to  
20 indicate anything about multiple people having access to the  
21 second floor or that the defendant didn't have any  
22 expectation of privacy in the second floor. All that they  
23 did with the second warrant was have Judge Case apparently  
24 white out the words "lower front" and insert the additional  
25 words "second floor for 56 Grimes but nothing else in the



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1 form of support for probable cause was inserted.

2 **MR. LYNCH:** Yeah, Paragraph 2A was put into the second  
3 affidavit regarding information --

4 **MAGISTRATE JUDGE SCHROEDER:** Then they threw in the  
5 garage --

6 **MR. LYNCH:** Attic.

7 **MAGISTRATE JUDGE SCHROEDER:** -- and attic but yet they  
8 don't put forth in an affidavit by the sheriff's deputy as to  
9 why the garage and the attic in any way would show the  
10 existence of contraband.

11 **MR. LYNCH:** And then we also establish coming -- as the  
12 Court is aware, common areas are not, you know, they are not  
13 subject to the same protections that a premises or a  
14 residence would be. So --

15 **MAGISTRATE JUDGE SCHROEDER:** Where was there a common  
16 area in the --

17 **MR. LYNCH:** -- the attic.

18 **MAGISTRATE JUDGE SCHROEDER:** Yeah but they actually  
19 broke down the door.

20 **MR. LYNCH:** No, they didn't.

21 **MAGISTRATE JUDGE SCHROEDER:** They breached the door on  
22 the second floor --

23 **MR. LYNCH:** Right.

24 **MAGISTRATE JUDGE SCHROEDER:** -- into that apartment area  
25 and then they went to the attic.

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1       **MR. LYNCH:** But the attic was accessible to Ray Loman  
2 and to anyone else on the second floor.

3       **MR. HARRINGTON:** Judge, that's -- wait. Wait a minute.  
4 He's making all sorts of arguments here.

5       First of all, we don't agree with them.

6       But, secondly, either we're going to argue it today or  
7 we're not going to argue it today. And, I mean, for example,  
8 the issue about his standing here was never raised by the  
9 government. We submitted the affidavit. We put on proof  
10 about it and never questioned.

11       **MAGISTRATE JUDGE SCHROEDER:** And I found that Mr. Burgin  
12 had standing.

13       **MR. HARRINGTON:** Right.

14       **MAGISTRATE JUDGE SCHROEDER:** That's why we held a  
15 evidentiary hearing.

16       **MR. HARRINGTON:** Okay.

17       **MR. LYNCH:** Well, but -- well, I mean to say we never  
18 objected. We, we -- first of all, we have claimed it  
19 throughout. We claimed it in our initial response to their  
20 papers. They filed a supplemental affidavit. Okay, that was  
21 enough to get a hearing. Now we had a hearing and now we can  
22 still --

23       **MR. HARRINGTON:** But --

24       **MR. LYNCH:** Just because you -- just because you had a  
25 hearing doesn't mean you have established that you have a

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1 reasonable expectation of privacy.

2 **MAGISTRATE JUDGE SCHROEDER:** Wait a minute.

3 **MR. LYNCH:** It means you have --

4 **MAGISTRATE JUDGE SCHROEDER:** Wait a minute.

5 **MR. LYNCH:** -- enough to conduct --

6 **MAGISTRATE JUDGE SCHROEDER:** Wait a minute.

7 **MR. LYNCH:** -- a hearing.

8 **MAGISTRATE JUDGE SCHROEDER:** Wait a minute. Wait a  
9 minute. But Mr. --

10 **MR. LYNCH:** We still have --

11 **MAGISTRATE JUDGE SCHROEDER:** Mr. Burgin testified --

12 **MR. LYNCH:** Okay.

13 **MAGISTRATE JUDGE SCHROEDER:** But he testified as to why  
14 he felt he had an expectation of privacy.

15 **MR. LYNCH:** That --

16 **MAGISTRATE JUDGE SCHROEDER:** He testified under oath as  
17 to how he used those second floor premises and the government  
18 never presented anything to contradict that.

19 **MR. LYNCH:** Well, one, I cross-examined him, Judge, on  
20 it.

21 **MAGISTRATE JUDGE SCHROEDER:** And I've read the  
22 cross-examination and you didn't establish anything to  
23 indicate that Mr. Burgin didn't have an office there or that  
24 he didn't use that second floor apartment. In fact, the  
25 government's claim was he was using it because they found the

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1 mail addressed to the other address.

2 **MR. HARRINGTON:** Right.

3 **MAGISTRATE JUDGE SCHROEDER:** So the government itself  
4 was claiming he was using that place.

5 **MR. LYNCH:** But, but, but there was other evidence --  
6 Judge, all I'm saying is your R and R didn't address that.  
7 Your R and R --

8 **MAGISTRATE JUDGE SCHROEDER:** It didn't have to because  
9 there was an invalid second search warrant --

10 **MR. LYNCH:** So --

11 **MAGISTRATE JUDGE SCHROEDER:** -- and the going into the  
12 second floor for a protective sweep was invalid --

13 **MR. LYNCH:** Okay.

14 **MAGISTRATE JUDGE SCHROEDER:** Based on the testimony of  
15 sheriff's deputy --

16 **MR. LYNCH:** But that's --

17 **MAGISTRATE JUDGE SCHROEDER:** -- being in the stairwell.

18 **MR. LYNCH:** And then the only other -- I mean, the other  
19 major point that, you know, we, we obviously -- your R and R  
20 doesn't address inevitable discovery and that's --

21 **MAGISTRATE JUDGE SCHROEDER:** Oh, that's an interesting  
22 question.

23 How is it inevitably discoverable that the contents of  
24 the second floor apartment was going to occur if there had  
25 not been a valid entry into that second floor? How was it

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1 going to be inevitably discovered?

2 **MR. LYNCH:** Because once -- well, one, they got a search  
3 warrant for the lower.

4 **MAGISTRATE JUDGE SCHROEDER:** I'm sorry?

5 **MR. LYNCH:** They got a search warrant for the lower  
6 validly authorized.

7 **MAGISTRATE JUDGE SCHROEDER:** The lower front.

8 **MR. LYNCH:** Correct, I got it.

9 **MAGISTRATE JUDGE SCHROEDER:** Which is a very limited  
10 area.

11 **MR. LYNCH:** Okay, but once you go in the premises,  
12 Judge, there is to lower front. We all know that.

13 **MAGISTRATE JUDGE SCHROEDER:** There was a lower front.

14 **MR. LYNCH:** There was no lower front.

15 **MAGISTRATE JUDGE SCHROEDER:** There was a front door  
16 on --

17 **MR. LYNCH:** Right.

18 **MAGISTRATE JUDGE SCHROEDER:** -- 56 Grimes which they saw  
19 the codefendant enter and leave. They went for the search  
20 warrant based on what they observed. The law enforcement  
21 authorities utilized the term "lower front".

22 **MR. LYNCH:** Right. (Indiscernible.)

23 **MAGISTRATE JUDGE SCHROEDER:** Now, I will give you the  
24 front or lower floor was a bar area.

25 **MR. LYNCH:** Correct.

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1       **MAGISTRATE JUDGE SCHROEDER:** But that's all it was. It  
2 was an open area.

3       **MR. LYNCH:** Correct.

4       **MAGISTRATE JUDGE SCHROEDER:** That has nothing to do with  
5 the second floor. And how can you claim that what was on the  
6 second floor would be inevitably discovered when they were on  
7 the first floor?

8       **MR. LYNCH:** Well, Judge, we actually -- I mean, one, we  
9 cited Second Circuit cases that suggest that, you know,  
10 situations where a protective sweep was done and --

11       **MAGISTRATE JUDGE SCHROEDER:** A valid -- a valid  
12 protective sweep.

13       **MR. LYNCH:** An invalid one in the *Whitehorn* case and in  
14 the *Schleede* case. But, but --

15       **MAGISTRATE JUDGE SCHROEDER:** Let me ask you this. Do  
16 you -- do you, as an officer of the court, really believe  
17 that the actions of Captain --

18       **UNIDENTIFIED SPEAKER:** Chief Granville.

19       **MAGISTRATE JUDGE SCHROEDER:** -- Granville when he was  
20 leading 12 to 14 officers to go into the lower front as the  
21 warrant indicated, the front door on 56 Grimes that they saw  
22 the codefendant go in and out twice, that he then goes into  
23 the side door because Special Agent Webb says oh, no, no, no,  
24 we have to go in the side door? He goes into the side door  
25 with all the officers behind him and he's now in a confined

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1 stare well with nothing but stairs going to the second floor,  
2 that he acted reasonably instead of backing out and then  
3 reconsidering what they should have done? Which they  
4 ultimately did. They went in through the front door.

5 **MR. LYNCH:** But I guess my point is on the inevitable  
6 discovery -- and I, I understand Mr. Harrington's point,  
7 we're not here to argue but the Court did open up the  
8 inquiry.

9 Our point is inevitable discovery, Judge, that doctrine  
10 applies because there was a Fourth Amendment violation. So  
11 we know that there's a string of cases that authorize and  
12 will admit certain evidence over a suppression motion even  
13 when there's a Fourth Amendment violation. Otherwise, these  
14 doctrines wouldn't exist. And so the inevitable discovery  
15 doctrine applies. The independent source doctrine applies.

16 I mean, we, we had briefed this from the beginning of  
17 the case. It was part of our proof in the hearing. So, the  
18 R and R didn't address it and we think that those are valid  
19 arguments. I mean, we're fine to take it up to Judge Arcara  
20 and that's okay. But since we were coming back here anyways,  
21 we opened up, obviously, arguments for the Court to  
22 understand what our position was going to be. If, if you  
23 decline to entertain them or amplify your decision in any  
24 way, we'll take it up to Judge Arcara -- that's perfectly  
25 fine -- where there is a remedy for us.

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1 But I guess those are just some of the arguments that we  
2 think that are factually and legally sound and while I  
3 understand your concern about the entry into the second floor  
4 not only once, not only twice, but three times, we understand  
5 that, Judge, but -- and there is a balancing that is  
6 conducted and, and there is an interest in the government  
7 ensuring that even if there's police, alleged police  
8 misconduct, that there is still an interest that society has  
9 in making sure that the guilty essentially get convicted.  
10 And there is a balancing that has to be conducted. That's  
11 why the inevitable discovery doctrine applies or is, is a  
12 valid basis for the introduction of certain evidence. And  
13 we've, I think, Judge, legitimately set forth strong factual  
14 and legal arguments for why that applies.

15 **MAGISTRATE JUDGE SCHROEDER:** Let me ask you: Why was  
16 the exclusionary rule adopted?

17 **MR. LYNCH:** Well, of course. I mean, we agree. There  
18 has to be --

19 **MAGISTRATE JUDGE SCHROEDER:** Why?

20 **MR. LYNCH:** -- certain -- there has to be --

21 **MAGISTRATE JUDGE SCHROEDER:** It was adopted to deter --

22 **MR. LYNCH:** Yep.

23 **MAGISTRATE JUDGE SCHROEDER:** -- illegal activity by law  
24 enforcement officers.

25 **MR. LYNCH:** Correct. I -- Judge, I wholeheartedly



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1 agree. But there are exceptions to the exclusionary rule and  
2 one of them is the inevitable discovery doctrine.

3 **MAGISTRATE JUDGE SCHROEDER:** And I ruled otherwise. I  
4 ruled that the conduct of the police officers, the sheriff's  
5 officers and Special Agent Webb in this case, was abhorrent.

6 **MR. LYNCH:** But that still -- we have raised a legal  
7 argument based on facts that are in the record that the court  
8 just didn't address. And, and --

9 **MAGISTRATE JUDGE SCHROEDER:** Only because I thought the  
10 issues were mooted out by reason of the fact that the second  
11 warrant was invalid and the search was invalid.

12 **MR. HARRINGTON:** Judge -- Judge, this points out why  
13 I -- we came back here asking you for other findings. This  
14 is exactly what it is.

15 **MAGISTRATE JUDGE SCHROEDER:** I know.

16 **MR. HARRINGTON:** And when you talk about things like  
17 inevitable discovery, good faith and the rest of this  
18 sophistry that does away with people's rights under the  
19 Fourth Amendment, I mean, you can't trust anything, even a  
20 brilliant decision from a magistrate judge.

21 **MAGISTRATE JUDGE SCHROEDER:** I have real concerns with  
22 respect to both sides' positions in that, once again, I know  
23 you spend a good deal of time on the failure to comply with  
24 New York Criminal Procedure Law or Penal Law on the obtaining  
25 of the warrant, the execution of the warrant, the nonfiling

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1 of the warrant and so forth.

2 To me, the case law by the Supreme Court of the United  
3 States clearly establishes that when deciding Fourth  
4 Amendment issues, it's solely a federal analysis that  
5 applies. Even if state law is totally disregarded or  
6 violated, so long as the Fourth Amendment procedures are  
7 followed, it doesn't make any difference.

8 **MR. HARRINGTON:** And what, what we say is there has to  
9 be a baseline for that some place down in the gutter that  
10 they can't just put flimsy allegations of probable cause,  
11 violate the law over and over again and all the rest. All we  
12 want to do is make a record. Even though --

13 **MAGISTRATE JUDGE SCHROEDER:** Oh, no, I understand.

14 **MR. HARRINGTON:** We're aware of what the cases say.  
15 We're aware of that.

16 **MAGISTRATE JUDGE SCHROEDER:** And I agree with you. They  
17 have to establish probable cause. That's the requirement of  
18 the Fourth Amendment.

19 **MR. HARRINGTON:** Right. And one of the -- we argue that  
20 they didn't.

21 **MAGISTRATE JUDGE SCHROEDER:** I know. I'm --

22 **MR. HARRINGTON:** In the first warrant --

23 **MAGISTRATE JUDGE SCHROEDER:** I'm just saying --

24 **MR. LYNCH:** In the first warrant --

25 **MAGISTRATE JUDGE SCHROEDER:** I'm just saying the

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1 procedure of arguments as to the failure to comply with New  
2 York State law doesn't impact on the probable cause issue.

3 **MR. HARRINGTON:** But it matters because of the police  
4 conduct itself, okay. It's not like you got some rookie  
5 comes in and he makes a bunch of mistakes and the dumb judge  
6 gives him a warrant and off he goes and it ends up in federal  
7 court. That's not what we have here. We argue that from the  
8 beginning of this case through your decision, including the  
9 testimony of these officers on the stand, that there was  
10 misleading of all of the courts. That's what we argue.

11 **MAGISTRATE JUDGE SCHROEDER:** I understand. I  
12 understand.

13 **MR. LYNCH:** And then --

14 **MAGISTRATE JUDGE SCHROEDER:** And --

15 **MR. LYNCH:** And Mr. Glaberson makes a good point, too,  
16 Judge, to me, which is that the last thing I want to do is  
17 come back here from Judge Arcara. I mean, if we go up and he  
18 says, well, I need more factual findings or, you know, go  
19 back and have Judge Schroeder determine the standing issue  
20 that you've raised here. You know, we want to move this case  
21 forward and the last thing I want to do is go up and then  
22 find out I'm back here again -- not that I don't like you  
23 Judge. I like you. I just -- I want to move this case  
24 along.

25 And so really we're hoping that, you know, if we're

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1 back -- if we're already back here on supplemental motions,  
2 I'd ask you to just really look at the arguments we've made  
3 and just see if there's a way that, you know, one, I'd like  
4 to convince you to think otherwise about your decision but if  
5 you don't, at least decide the issues that we've raised.

6 **MAGISTRATE JUDGE SCHROEDER:** Oh, I plan on --

7 **MR. LYNCH:** Okay.

8 **MAGISTRATE JUDGE SCHROEDER:** -- doing that. I was just  
9 looking for some further enlightenment to make sure that I'm  
10 not missing something that I should consider.

11 For example, here is one issue that is troubling to me  
12 from both perspectives. And it's this:

13 There is case law that clearly establishes the principle  
14 that a Constitutional right cannot be vicariously adopted by  
15 a codefendant or by a third-party.

16 And so we have this issue that the claim is being made  
17 by Mr. Washington that the search of 56 Grimes was illegal in  
18 violation of the Fourth Amendment. I've already ruled or  
19 recommended that, yes, the search at 56 Grimes was in  
20 violation of the Fourth Amendment but it was in violation of  
21 the Fourth Amendment rights of Mr. Burgin, not Mr.  
22 Washington.

23 And, therefore, if I follow the established case law of  
24 the United States Supreme Court and lower courts, Mr.  
25 Washington cannot validly and vicariously latch on to that

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1 violation because it's not his Fourth Amendment right that  
2 was violated, it was Burgin's.

3 However, the other side of the coin that troubles me is  
4 to what extreme can law enforcement go and have that  
5 principle continue to apply?

6 And I give you this hypothetical: A bunch of storm  
7 troopers knowingly, intentionally storm into a residence of a  
8 citizen who is suspected of being a drug king and a weapons  
9 purveyor, without a search warrant, without anything, they  
10 just storm in and they scoop up everything. And in reviewing  
11 and analyzing what they've scooped up from this act, they  
12 find names and emails and documents leading to other people  
13 and they use that evidence and that information to go and get  
14 a search warrant for Citizen A, telling the judge that we  
15 have recovered evidence that indicates that Citizen A is a  
16 co-purveyor of firearms and drugs with this notorious other  
17 individual and they don't tell the judge how they got this  
18 evidence.

19 It seems to me that if we're going to be a law-abiding  
20 Democracy, there's got to be some remedy to not allow that to  
21 happen. And that might be a further expansion of the  
22 exclusionary rule as a means of deterring that kind of  
23 activity by law enforcement personnel.

24 I put that out there for both sides' consideration in  
25 further enlightening me.

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1       **MR. LYNCH:** Well, obviously, that doesn't apply to  
2 Mr. Burgin but we'll tell, we'll tell Mr. Foti that --

3       **MAGISTRATE JUDGE SCHROEDER:** Yeah, that's why I'm --

4       **MR. LYNCH:** Yeah.

5       **MAGISTRATE JUDGE SCHROEDER:** -- somewhat concerned about  
6 Mr. Foti not being present.

7       **MR. LYNCH:** Right. We'll send him an email addressing  
8 that issue so he can be prepared for it.

9       **MAGISTRATE JUDGE SCHROEDER:** All right. Let me just  
10 make sure that I now know all of the present outstanding  
11 issues and so that we can wrap this thing up.

12       As to the defendant Washington, as I understand it,  
13 Mr. Harrington, one of the claims is that the government has  
14 not yet provided Rule 12 notice to the defendant. It's at  
15 Page 6 of your submission.

16       **MR. LYNCH:** No, I think that --

17       **MR. HARRINGTON:** Mr. Burgin.

18       **MR. LYNCH:** Mr. Burgin is different. You said Mr.  
19 Washington.

20       **MAGISTRATE JUDGE SCHROEDER:** I'm sorry, you're right.  
21 No, I can't address Washington because Foti's not here.

22       As to Burgin, the defendant is asking me to make  
23 supplemental findings of fact to the R and R and, as I've  
24 indicated, based on what the government responded, it had no  
25 objection to some of it but, yet, Mr. Harrington now

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1 indicates there might be some further refinement that's  
2 necessary.

3 I would accept a stipulation of facts just so I can make  
4 a ruling. But I still say I don't see the relevancy of it on  
5 the issue of probable cause. That is whether the doors were  
6 locked, were the doors entered or what they entered into, et  
7 cetera.

8 I also understand that the argument made on behalf of  
9 the Defendant Burgin about the noncompliance with the New  
10 York State law on search warrants.

11 But, once again, there, I rely on the Supreme Court  
12 decision in *California v. Greenwood*, 486 United States 35, a  
13 1988 decision, and *Virginia v. Moore*, a Supreme Court  
14 decision, 553 U.S. 164, a 2008 decision which basically says  
15 that even though individual states may construe their own  
16 Constitutions as imposing more stringent constraints on  
17 police conduct than does the federal Constitution, state law  
18 does not alter the content of the Fourth Amendment and,  
19 therefore, the analysis is to be done in a federal case in  
20 accordance with federal law on the application of the Fourth  
21 Amendment.

22 The third claim on behalf of the defendant Burgin, as I  
23 understand it, is the claim that there was no probable cause  
24 for the issuance of the second search warrant at Grimes. I  
25 considered that issue moot when I did my original Report and

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1 Recommendation. Because I was finding that the second search  
2 warrant was invalid based on the facts that have been  
3 established in the evidentiary hearings.

4 The fourth issue relates to the stop of the defendant's  
5 car on July 19th, 2019, and the seizure of phones from that  
6 car.

7 Now, the government in its responding papers had  
8 indicated that there was a valid vehicle and traffic stop of  
9 Mr. Burgin's automobile. There was no testimony in the  
10 evidentiary hearings. The testimony that I recall was that  
11 when they went back to 56 Grimes after the nephew had been  
12 arrested, they followed the automobile. They saw Mr. Burgin  
13 driving to the gas station which was in the same vicinity,  
14 maybe even across the street from the AutoZone store. He was  
15 at the gasoline pumps and they came and they approached his  
16 vehicle and asked him where he was coming from or where he  
17 was going and they didn't like his answers and claimed his  
18 answers were a lie.

19 Nowhere in the testimony of any of those, either the  
20 sheriff's deputies, Webb didn't testify --

21 **MR. HARRINGTON:** Judge, there's confusion here because  
22 we're talking about a different stop.

23 **MAGISTRATE JUDGE SCHROEDER:** We're not talking about the  
24 gas station stop?

25 **MR. HARRINGTON:** No. We're talking about almost a year



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1 before. The previous July Mr. Burgin was stopped out here on  
2 the traffic circle and taken into custody and they  
3 searched --

4 **MAGISTRATE JUDGE SCHROEDER:** Oh, that's right.

5 **MR. HARRINGTON:** -- his car. Right. And Mr. Lynch  
6 withdrew that any evidence that from stop being offered and  
7 we said we still need evidence on it because it shows up in  
8 later warrants issues -- as a basis for later search warrants  
9 for phones and other premises.

10 **MAGISTRATE JUDGE SCHROEDER:** My question that I wanted  
11 answered and reaffirmed was: Was there ever a vehicle and  
12 traffic violation issued to Mr. Burgin?

13 **MR. LYNCH:** So, okay, so now we're -- just so we're  
14 clear, we're referring now to the February 2020 stop, 2019 --  
15 or --

16 **MAGISTRATE JUDGE SCHROEDER:** July 19th --

17 **MR. LYNCH:** July 19th, 2019?

18 **MAGISTRATE JUDGE SCHROEDER:** -- 2019.

19 **MR. LYNCH:** So that occurred what Mr. Harrington said,  
20 out here, they detained Mr. --

21 **MAGISTRATE JUDGE SCHROEDER:** Burgin.

22 **MR. LYNCH:** -- Burgin. He went back to BPD  
23 headquarters. We withdrew any evidence. We're not, we're  
24 not --

25 **MAGISTRATE JUDGE SCHROEDER:** You took cell phones from

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1 the car.

2 **MR. LYNCH:** Right. And we said we're not going to use  
3 that evidence. So we withdrew our notice to the defendant  
4 that we were going to use that. So, therefore, we never had  
5 a hearing on that issue.

6 **MAGISTRATE JUDGE SCHROEDER:** Did they return the phones?

7 **MR. LYNCH:** I don't know that they've even made a claim  
8 for the return of the phones but I don't even think we've  
9 accessed some of those phones. There were many of them we  
10 weren't accessed (sic). So that one -- but if you're now  
11 referring to the February 19th, 2020, stop at the Valero gas  
12 station across the street from the AutoZone --

13 **MAGISTRATE JUDGE SCHROEDER:** Well, wait.

14 Before -- I had indicated that that seems to still be a  
15 viable issue raised in the supplemental filing: Where it's  
16 stated on behalf of Mr. Burgin that the stop of the  
17 defendant's car on July 19, 2019, and the seizure of the  
18 phones, even though the government has withdrawn the use of  
19 this evidence, that a paragraph in Webb's affidavit for the  
20 search warrant, 20-MJ-65, somehow or other is invalid.

21 And, so, all I'm asking is: Is that still really an  
22 issue since the government says it's not going to use --

23 **MR. LYNCH:** Right.

24 **MAGISTRATE JUDGE SCHROEDER:** -- the evidence?

25 **MR. LYNCH:** That was our point.

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1           **MAGISTRATE JUDGE SCHROEDER:** So why is that an issue,  
2 Mr. Harrington?

3           **MR. HARRINGTON:** Because it's used later in other search  
4 warrants.

5           **MR. LYNCH:** But I -- which one, Mr. Harrington? Because  
6 I don't remember anyone where we've used that.

7           **MR. THOMPSON:** While he's doing that, Judge, just back  
8 to the Court's question.

9           We've requested the phones be returned. They haven't  
10 been returned.

11           **MAGISTRATE JUDGE SCHROEDER:** All right. Seems to me if  
12 the government has acknowledged it's not going to use the  
13 phones, they should be returned as the property of Defendant  
14 Burgin.

15           **MR. LYNCH:** I don't remember the request being made but  
16 we'll certainly take care of it.

17           **MAGISTRATE JUDGE SCHROEDER:** All right. So that becomes  
18 a moot issue, correct?

19           **MR. THOMPSON:** Right.

20           **MR. LYNCH:** Correct.

21           **MAGISTRATE JUDGE SCHROEDER:** Okay.

22           Then the Defendant Burgin also claims that the search  
23 and seizure -- or the seizure and search of the cell phones  
24 were based on an illegal car stop of February 19th, 2020.

25           **MR. LYNCH:** Right.

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1           **MAGISTRATE JUDGE SCHROEDER:** Which I found in my Report  
2 and Recommendation. That's the gas station stop.

3           **MR. LYNCH:** Correct.

4           And in that regard, Judge, we agree, there was no  
5 traffic violation. But our argument from the beginning has  
6 been they had probable cause to arrest Mr. Burgin that day.

7           **MAGISTRATE JUDGE SCHROEDER:** What was the probable  
8 cause?

9           **MR. LYNCH:** Well, they had the informant who said --

10          **MAGISTRATE JUDGE SCHROEDER:** Only, only the nephew.

11          **MR. LYNCH:** No, remember what the informant said? The  
12 informant said: I met with David Burgin. David Burgin told  
13 me that the cocaine was going to come from his nephew  
14 Pierce -- from Pierce. And they were then in communication  
15 with -- the source was in communication with a Pierce. They  
16 said, hey, I've already gotten the kilos that are here at my  
17 house, or wherever they were found. I got them from Pierce  
18 and Burgin.

19          Okay, that's one -- that's already some cocaine.

20          Then he says I'll set up a buy for another kilo.

21          **MAGISTRATE JUDGE SCHROEDER:** Right.

22          **MR. LYNCH:** Pierce delivers the, the cocaine to them.

23          Pierce had come from 56 Grimes which law enforcement  
24 knew from other informants was being used by Burgin that  
25 Washington also used it as a stash house. They then see

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1 Burgin's vehicle there. He then leaves. Then they approach  
2 him. He lies to them and they take him into custody. Now --

3 **MAGISTRATE JUDGE SCHROEDER:** But what, what -- but they  
4 didn't charge him with anything.

5 **MR. LYNCH:** Okay. But they don't have to charge him  
6 with anything and that's what we -- no, Judge, we made that  
7 point in our papers. The subjective intent of the officer is  
8 completely irrelevant. The only issue before the Court --

9 **MAGISTRATE JUDGE SCHROEDER:** I understand that.

10 **MR. LYNCH:** The only issue the Court has to decide is  
11 whether there was probable cause based on the information  
12 provided.

13 **MAGISTRATE JUDGE SCHROEDER:** And I said there wasn't --

14 **MR. LYNCH:** Well --

15 **MAGISTRATE JUDGE SCHROEDER:** -- because I didn't hear  
16 any testimony or any evidence to indicate what the probable  
17 cause was --

18 **MR. LYNCH:** Judge, they could have --

19 **MAGISTRATE JUDGE SCHROEDER:** -- for, for stopping him in  
20 his automobile which was already stopped at the gas station  
21 and seizing evidence from his automobile.

22 **MR. LYNCH:** Well, no, they didn't seize evidence from  
23 his automobile.

24 **MAGISTRATE JUDGE SCHROEDER:** They took phones, didn't  
25 they?

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1           **MR. LYNCH:** They seized his automobile. Then they got a  
2 search warrant for the automobile.

3           **MAGISTRATE JUDGE SCHROEDER:** Well, they seized the  
4 entire automobile.

5           **MR. LYNCH:** Correct, but --

6           **MAGISTRATE JUDGE SCHROEDER:** Then there was the  
7 so-called dog sniff, which is also a mystery because we never  
8 had an affidavit --

9           **MR. LYNCH:** Why would --

10          **MAGISTRATE JUDGE SCHROEDER:** -- from the officer  
11 indicating what the dog actually did. The government  
12 produced an affidavit about the dog's training but  
13 mysteriously --

14          **MR. LYNCH:** No --

15          **MAGISTRATE JUDGE SCHROEDER:** -- couldn't find the other  
16 evidence.

17          **MR. LYNCH:** -- that's a different case.

18           I put the dog handler on. The dog handler went through  
19 exactly what happened. That's a different case. That's the  
20 other case with Washington's vehicle.

21           This had to do with Burgin. We put Bob Galbraith on.  
22 Bob Galbraith testified regarding what exactly it occurred.

23          **MAGISTRATE JUDGE SCHROEDER:** They didn't find any drugs  
24 in the automobile.

25          **MR. LYNCH:** Right. No, they did not.

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1           **MAGISTRATE JUDGE SCHROEDER:** So why did they seize the  
2 phones?

3           **MR. LYNCH:** Well, because he -- well, I mean, they had  
4 evidence of his involvement in narcotics trafficking. Phones  
5 are --

6           **MAGISTRATE JUDGE SCHROEDER:** Based on the February stop,  
7 the February --

8           **MR. LYNCH:** Yeah.

9           **MAGISTRATE JUDGE SCHROEDER:** -- 19th --

10          **MR. LYNCH:** Based on the informant's information and  
11 everything else. I mean, drug -- I mean, phones are tools of  
12 drug trafficking. And it was more than one phone. It was  
13 multiple phones.

14          **MR. HARRINGTON:** Judge, but that --

15          **MAGISTRATE JUDGE SCHROEDER:** I think they're  
16 contesting -- wait.

17          **MR. HARRINGTON:** Right. Right.

18          **MAGISTRATE JUDGE SCHROEDER:** I know they're contesting  
19 2 out of 26 phones. But that might be from the seizure at  
20 Bennett Village.

21          **MR. LYNCH:** So, I mean, you can -- they could have  
22 arrested.

23          **MAGISTRATE JUDGE SCHROEDER:** I know I'm mixing up.

24          **MR. LYNCH:** I know.

25               But they could have arrested him for drug conspiracy.

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1 That's, that's my point, Judge. That's probable cause. They  
2 had an informant. They had a witness. They had drugs on the  
3 table.

4 **MAGISTRATE JUDGE SCHROEDER:** But they didn't arrest him.

5 **MR. LYNCH:** But whether they did or didn't -- the reason  
6 why the courts have said you don't look at just what the  
7 officer's intent is because otherwise you would have  
8 individual officers who ultimately are going to decide: I  
9 thought there was probable cause, I didn't know there was  
10 probable cause. That's why it's an objective determination  
11 by the Court to look at all the facts that are developed and  
12 make an objective decision based on the law.

13 **MAGISTRATE JUDGE SCHROEDER:** Which they did.

14 **MR. LYNCH:** Not -- because, otherwise, you have rookie  
15 officer who doesn't think he has probable cause and you have  
16 veteran officer who does think there's probable cause and you  
17 have inconsistent --

18 **MAGISTRATE JUDGE SCHROEDER:** And I heard the testimony  
19 of the witnesses and I concluded, after reviewing the  
20 transcripts and citing to the transcripts, there was no  
21 probable cause for the February 19th, 2020, automobile  
22 search -- seizure of the automobile and then the search of  
23 it.

24 **MR. HARRINGTON:** Judge, that -- that leads us also into  
25 the issue of the phone calls of Mr. Pierce and the



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1 confidential --

2 **MAGISTRATE JUDGE SCHROEDER:** Confidential informant.

3 **MR. HARRINGTON:** -- informant. Which we presented  
4 testimony to the Court and a different translation of it  
5 which is far different than which Mr. Lynch wants to argue  
6 about what was going on between Pierce and the confidential  
7 informant. So that needs to be reviewed, also.

8 **MAGISTRATE JUDGE SCHROEDER:** All right. Well, I just  
9 want to make sure I'm covering what still remains to be  
10 addressed.

11 The next claim was the seizure and search of the DVR  
12 that was taken from 56 Grimes on February 19th, 2020,  
13 pursuant to search warrant 20-MJ-55.

14 Why is that even to be treated as an issue if I rule  
15 that everything on the second floor that was seized was  
16 seized illegally?

17 **MR. HARRINGTON:** For the same reason before as I argue  
18 that the search warrant was invalid, okay, I'm arguing that  
19 the DVR was not part of either search warrant. They had no  
20 authority to take it whether they were in there legally or  
21 not legally. Mr. Lynch argues differently. Mr. Glaberson  
22 argued differently. But we want a decision from the Court  
23 as to --

24 **MAGISTRATE JUDGE SCHROEDER:** But isn't that argument --

25 **MR. HARRINGTON:** -- whether --

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1           **MAGISTRATE JUDGE SCHROEDER:** -- by both the government  
2 and you moot by reason of my finding?

3           **MR. HARRINGTON:** It is unless we get a crazy Second  
4 Circuit.

5           **MAGISTRATE JUDGE SCHROEDER:** All right. I understand.

6           **MR. LYNCH:** He says crazy. I say correct decision from  
7 the Second Circuit.

8           **MAGISTRATE JUDGE SCHROEDER:** I'm not going to  
9 characterize the Second Circuit.

10          **MR. HARRINGTON:** I'm not afraid of the Second Circuit.

11          **MAGISTRATE JUDGE SCHROEDER:** Now, there's also,  
12 according to Defendant Burgin, the issue of 79 Brunswick,  
13 the search there, claiming that the search warrant for the  
14 79 Brunswick, which I believe is search warrant 20-MJ-35,  
15 with specific emphasis on Paragraph 35 in that application or  
16 that affidavit, that that's all based on what was determined  
17 and learned from the illegal search at 56 Grimes and that the  
18 defendant claims is all fruit of a poison tree, correct?

19          **MR. HARRINGTON:** In part. But, Judge, there's other  
20 things -- and the Court has to look at it, exclude what  
21 you've suppressed and look at it and see if you think, with  
22 that stuff out of it, there's still probable cause that's  
23 what we're asking the Court to make a finding.

24          **MAGISTRATE JUDGE SCHROEDER:** Yeah, if I take Paragraph  
25 35 out of the affidavit --

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1       **MR. LYNCH:** Is there still --

2       **MAGISTRATE JUDGE SCHROEDER:** -- whether there is  
3 sufficient probable cause remaining as to the issuance of the  
4 warrant.

5       **MR. LYNCH:** Right.

6       **MAGISTRATE JUDGE SCHROEDER:** Okay. I just want to make  
7 sure --

8       **MR. LYNCH:** Yeah, we're all in agreement on that.

9       **MAGISTRATE JUDGE SCHROEDER:** -- we're checking off all  
10 of the issues that need to be further considered.

11       And the last one as to Defendant Burgin I have is  
12 the August 25th, 2020, seizure of 26 cell phones, 18 from  
13 79 Brunswick pursuant to search warrant issued based on the  
14 56 Grimes events as set forth in Paragraph 12 of the  
15 affidavit in support of that search warrant.

16       And then there is this second issue raised about  
17 staleness, correct --

18       **MR. HARRINGTON:** Right.

19       **MAGISTRATE JUDGE SCHROEDER:** -- that's the issue?

20       **MR. LYNCH:** Right.

21       **MAGISTRATE JUDGE SCHROEDER:** Now, we have the *Smith* case  
22 to also consider in the context of the search of phones. And  
23 I understand the position of both parties but I just want to  
24 make sure that I'm not missing something.

25       The government asserts, rightfully, that the final

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1 decision of *Smith* by the Second Circuit that 31 days  
2 presumptively is a delay in violation, under the facts of  
3 that case, of Smith's Fourth Amendment rights. And that even  
4 though the phones were seized well before the *Smith* decision  
5 and held by the government, the law enforcement personnel had  
6 no way of knowing what the Second Circuit Court of Appeals  
7 was going to rule in *Smith* and because they lack that  
8 knowledge, there was no obligation to undertake an actual  
9 search of the phones in a diligent efficacious manner. And  
10 that when the final decision came from the Second Circuit  
11 talking about a presumption of 31 days being too long, within  
12 a matter of 30 some days, August 30th or somewhere around  
13 there --

14 **MR. LYNCH:** August 25th.

15 **MAGISTRATE JUDGE SCHROEDER:** -- August 25th, application  
16 was made for a search warrant.

17 **MR. LYNCH:** Right. And I think the -- the other  
18 argument we made, Judge, is their initial papers said stale,  
19 the affidavit is stale.

20 Now they didn't cite *Smith* in their original papers. I  
21 raised that in my response that I filed in January of 2022.  
22 I said it does not appear that they're making a *Smith* motion  
23 because -- I apologize, Judge, just one second.

24 I have it in my notes. So it's footnote 9 of my motion  
25 response. Okay. So, in -- so this is January of 2022. The

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1 defendant does not cite *United States v. Smith* which was  
2 decided after the warrants were issued in this case. So the  
3 government has not addressed the reasonableness of the delay  
4 in obtaining the warrants for cell phones seized in July of  
5 2019. So, they cite -- they just generally cite staleness.

6 So, their reply that they filed, I believe the next  
7 month, February of 2022, they didn't address it in their  
8 reply. The defendants -- none of the defendants'  
9 affidavits -- address the usefulness of any of these cell  
10 phones to him. I mean, quite frankly, 26 devices, I can't  
11 imagine that any one was particularly of significance to him  
12 when you have 26 cell phones when most people only have one.

13 But setting that aside, I don't think that Mr. Burgin  
14 ever made a sufficient claim for a *Smith* motion and we took  
15 his staleness argument as just being whether information  
16 that's on a phone can be sought -- a search warrant can be  
17 sought months after the item has been seized and whether that  
18 information is now stale when we know that electronic  
19 evidence and it's even set forth in the affidavit, electronic  
20 evidence is much different than other types of evidence that  
21 could be dissipated or could be gone from a house or some  
22 location. Here, electronic evidence stays in many forms on a  
23 electronic device including in deleted areas and fragmented  
24 areas and things like that.

25 So, I don't necessarily know that he's brought a *Smith*

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1 motion. He's never cited *Smith* so how would the government  
2 know that that's, in fact, what they're claiming?

3 **MAGISTRATE JUDGE SCHROEDER:** Is it the government's  
4 position that if the seizure of an electronic device is done  
5 on the basis that the electronic device is an instrumentality  
6 of criminal activity or a tool of criminal activity, that,  
7 notwithstanding *Smith*, there's no requirement that there be a  
8 diligent effort to search the contents of that evidence, that  
9 phone, because it's, by itself, is evidence being held?

10 **MR. LYNCH:** I think that is, I don't know that it -- I'm  
11 not saying that wins the day every single time, Judge, I'm  
12 not saying that. But that is a critical factor because in  
13 *Smith*, it was much different. The item was not seized  
14 because of a warrant. It was seized in plain view.

15 **MAGISTRATE JUDGE SCHROEDER:** Right.

16 **MR. LYNCH:** And so --

17 **MAGISTRATE JUDGE SCHROEDER:** On the Thruway.

18 **MR. LYNCH:** Yeah. And so this was much different. I  
19 mean, the original warrant in this case when we searched  
20 79 Brunswick, the Court authorized the search of the item --  
21 or the seizure of the items and the search of those items.

22 **MAGISTRATE JUDGE SCHROEDER:** Which would cause *Smith* to  
23 come into play because if the seizure -- I mean, if there was  
24 to be a seizure and then a search, the search theoretically  
25 under *Smith* should have been done diligently.

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1       **MR. LYNCH:** There -- yes. But that's only one factor.

2       **MAGISTRATE JUDGE SCHROEDER:** No, I understand.

3       **MR. LYNCH:** The one --

4       **MAGISTRATE JUDGE SCHROEDER:** I understand there's --

5       **MR. LYNCH:** Yeah.

6       **MAGISTRATE JUDGE SCHROEDER:** -- four factors in *Smith*.

7       **MR. LYNCH:** Yeah.

8       **MAGISTRATE JUDGE SCHROEDER:** But I guess I still have  
9 the question of if you seize something as an instrument of  
10 criminal activity, like cell phones are as the courts have  
11 held in drug cases, they're the tools of the trade.

12       **MR. LYNCH:** Right.

13       **MAGISTRATE JUDGE SCHROEDER:** So you seize that  
14 instrument itself as a piece of evidence just like a gun.

15       **MR. LYNCH:** Yeah, I mean, I definitely, if they're --

16       **MAGISTRATE JUDGE SCHROEDER:** The only question I have  
17 is: Does that mean the government can sit on that evidence  
18 ad infinitum before actually making a search of the phone?

19       **MR. LYNCH:** Yes. I think we could sit on it. We may do  
20 it at our own peril for the use of the actual item -- the  
21 contents of that item but we could keep that item forever,  
22 right. I mean, a phone is evidence of drug trafficking. If  
23 a person has six phones in their car, I could argue, look it,  
24 ladies and gentlemen, who else has six phones but a drug  
25 dealer has six phones in his car, even if we never even get

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1 into the contents of them.

2 **MAGISTRATE JUDGE SCHROEDER:** No, I understand.

3 **MR. LYNCH:** Yeah.

4 **MAGISTRATE JUDGE SCHROEDER:** The government's not  
5 obligated to return evidence --

6 **MR. LYNCH:** Correct.

7 **MAGISTRATE JUDGE SCHROEDER:** -- of criminal activity.  
8 My question is but does there come a time when the  
9 government's got to take some action --

10 **MR. LYNCH:** I think --

11 **MAGISTRATE JUDGE SCHROEDER:** -- searching that.

12 **MR. LYNCH:** I think the Second Circuit has indicated,  
13 yes, we do have an obligation to take some efforts as one  
14 factor that has to be examined.

15 **MAGISTRATE JUDGE SCHROEDER:** Okay.

16 **MR. THOMPSON:** Judge, could I just clarify a little  
17 bit --

18 **MAGISTRATE JUDGE SCHROEDER:** Certainly.

19 **MR. THOMPSON:** -- on that? It's a little bit of a  
20 different issue. It's not exactly what the Court was  
21 addressing. But we're talking 26 electronic devices. We're  
22 not talking about 26 cell phones.

23 **MAGISTRATE JUDGE SCHROEDER:** You're talking about 2,  
24 right?

25 **MR. THOMPSON:** 2.



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1           **MAGISTRATE JUDGE SCHROEDER:** Item --

2           **MR. THOMPSON:** Yes.

3           **MAGISTRATE JUDGE SCHROEDER:** -- number seven and item  
4 number eight.

5           **MR. THOMPSON:** Right. And there are computers and  
6 there's other stuff. When you say 26, Mr. Lynch said, you  
7 know, that Mr. Burgin had 26 cell phones, he didn't. That's  
8 not accurate. And it's a little bit different -- it's a  
9 little bit difficult for us --

10           **MAGISTRATE JUDGE SCHROEDER:** Well, 18 were seized from  
11 the Brunswick address, 79 Brunswick, I believe 18 cell phones  
12 were seized, 2 of which are allegedly --

13           **MR. THOMPSON:** No, no. No.

14           **UNIDENTIFIED SPEAKER:** Your Honor --

15           **MR. LYNCH:** Yeah, and I -- Judge, I, I, I, if -- I don't  
16 doubt that Mr. -- I don't have that search warrant in front  
17 of me, so I apologize, Judge. I'm not sure.

18           **MAGISTRATE JUDGE SCHROEDER:** Well, I was just going by  
19 what was listed in the supplemental submissions.

20           **MR. THOMPSON:** And we can clarify that in our  
21 submissions to the Court, Judge.

22           The other thing on the question of delay, Judge, while  
23 you're looking for that, is it's hard for us to make  
24 particular allegations with respect to the delay of the  
25 search on the devices because we never got any discovery with

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1 respect to those searches.

2 **MAGISTRATE JUDGE SCHROEDER:** Okay. Let me go back. On  
3 August 25th, 2020, 26 cell phones were seized, 18 came from  
4 79 Brunswick.

5 **MR. THOMPSON:** I think that's just a misstatement,  
6 Judge.

7 **MAGISTRATE JUDGE SCHROEDER:** Okay, that's what I read.

8 **MR. THOMPSON:** Right. I understand.

9 **MAGISTRATE JUDGE SCHROEDER:** But as I further understand  
10 it, on behalf of Defendant Burgin, it's only claimed that two  
11 phones are involved.

12 **MR. GLABERSON:** Your Honor --

13 **MAGISTRATE JUDGE SCHROEDER:** Phones number seven and  
14 number eight.

15 **MR. GLABERSON:** -- that's related to Mr. Washington.

16 **MAGISTRATE JUDGE SCHROEDER:** Which --

17 **MR. GLABERSON:** Phones -- there were 13 devices. That  
18 search warrant 20-MJ-1137 authorized the digital search of 26  
19 total devices and 13 of those devices came from 69 Bennett  
20 Village Terrace and David Washington asserted that 2 of  
21 those, seven -- number seven and number eight belonged to  
22 him.

23 **MAGISTRATE JUDGE SCHROEDER:** But in the Burgin papers on  
24 the 79 Brunswick search, they're referring to search warrant  
25 20-MJ-35 and Paragraph 35 in that affidavit. I believe --

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1       **MR. GLABERSON:** Yes, it was incorporated by reference.

2       **MAGISTRATE JUDGE SCHROEDER:** And it's that search  
3 warrant 20-MJ-35 that it's utilized to seize the cell phones,  
4 18 of them from 79 Brunswick. And that Paragraph 35  
5 basically is referencing the events of what occurred at 56  
6 Grimes.

7       **MR. THOMPSON:** Yeah.

8       **MAGISTRATE JUDGE SCHROEDER:** And defendant is saying if  
9 you take out Paragraph 35, there's no probable cause  
10 established for the issuance of search warrant 20-MJ-35.  
11 That's what I understand the argument to be.

12       **MR. GLABERSON:** Understood. I was just clarifying with  
13 respect to which devices they were talking about.

14       **MAGISTRATE JUDGE SCHROEDER:** Okay. Now, unfortunately,  
15 we don't have Mr. Foti and Mr. Washington because I wanted to  
16 address some issues there, to just kind of focus and narrow  
17 as much as we could narrow things down.

18       So what I'm hearing today is that we need another  
19 session like this but only for purposes of going through it  
20 with the Washington issues.

21       **MR. LYNCH:** And I think Mr. Harrington wants an  
22 opportunity to respond.

23       The one thing I, I -- I just want to note for the record  
24 today, Judge, the defendants approached us today asking for  
25 additional time to respond -- to amplify their responses to

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1 some of our arguments but, otherwise, today Mr. Glaberson and  
2 I were prepared to go forward with oral argument on all of  
3 these motions today.

4 **MAGISTRATE JUDGE SCHROEDER:** I understand.

5 **MR. LYNCH:** Including Mr. Washington's and it's the --  
6 Mr. Washington's attorney who didn't appear today, and then  
7 Mr. Harrington's obviously has asked for additional time to  
8 assist the Court. And I just note the government's  
9 preparedness for the proceedings.

10 **MAGISTRATE JUDGE SCHROEDER:** I understand.

11 And just so Mr. Burgin understands -- and, of course,  
12 the same will apply to Mr. Washington -- there are motions  
13 pending on behalf of both defendants and the filing of those  
14 motions automatically cause the speedy trial clock to stop  
15 and to remain stopped until those motions have been finally  
16 resolved.

17 And, therefore, the time until that resolution of  
18 motions has occurred is to be excluded for purposes of the  
19 time requirement set forth in the Speedy Trial Act.

20 And that exclusion of time is done and is hereby so done  
21 pursuant to the provisions contained in Title 18 of the  
22 United States Code Section 3161(h)(1)(D).

23 Correct, Mr. Harrington?

24 **MR. HARRINGTON:** Yes, Judge.

25 **MAGISTRATE JUDGE SCHROEDER:** Correct, Mr. Lynch?

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1       **MR. LYNCH:** Yes, Judge.

2       **MAGISTRATE JUDGE SCHROEDER:** All right.

3       **MR. LYNCH:** I think --

4       **MAGISTRATE JUDGE SCHROEDER:** So --

5       **MR. LYNCH:** Yeah, I think we picked February 9th in the  
6 morning, Judge. I think it's -- as long as Ms. Guidotti  
7 picks a time, we've already indicated we're all available.

8       **MAGISTRATE JUDGE SCHROEDER:** What does my calendar look  
9 like?

10       (WHEREUPON, a discussion was held off the record  
11 between Judge Schroeder and courtroom deputy.)

12       **MAGISTRATE JUDGE SCHROEDER:** Make sure Mr. Foti becomes  
13 aware.

14       **MR. LYNCH:** We asked him about his availability  
15 specifically for that date. He said he was available.

16       **MAGISTRATE JUDGE SCHROEDER:** All right.

17       **MR. LYNCH:** So, just so the Court's clear as to what  
18 the -- just the mechanics of what's going to occur over the  
19 next two weeks.

20       Mr. Harrington and Mr. Glaberson and Mr. Thompson and I  
21 are going to meet next -- so the 30th, that's Tuesday, to  
22 discuss the potential stipulation regarding certain facts.

23       By December 7th, which is -- or, I'm sorry, February 7th  
24 which is Wednesday of the following week, Mr. Thompson and  
25 Mr. Harrington will file any reply to the government's

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1 supplemental response.

2 And then we'll be here for oral argument on  
3 February 9th.

4 **MAGISTRATE JUDGE SCHROEDER:** Okay. Now I've got a  
5 couple of housekeeping matters to attend to.

6 There was to be an affidavit submitted on behalf of  
7 Mr. Burgin, right?

8 **THE CLERK:** Financial affidavit.

9 **MAGISTRATE JUDGE SCHROEDER:** Financial affidavit.

10 **MR. HARRINGTON:** Right. That was a confusion between  
11 Mr. Thompson and I, Judge. We, we worked on it when you  
12 appointed him but we got to review it --

13 **MAGISTRATE JUDGE SCHROEDER:** Okay.

14 **MR. HARRINGTON:** -- now to make sure it's the accurate.

15 **MAGISTRATE JUDGE SCHROEDER:** Because there's not going  
16 to be any payment made --

17 **MR. HARRINGTON:** Right.

18 **MAGISTRATE JUDGE SCHROEDER:** -- until that affidavit is  
19 filed with the clerk's office. So, I would suggest you get  
20 it in forthwith.

21 Now, I don't want you to treat it as a sanction or a  
22 criticism in any way but it does give me some leverage by  
23 reason of the fact that the deadline wasn't met in this  
24 context.

25 I have been searching diligently, as has my court

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1 deputy, to find an attorney to represent a defendant in a  
2 collateral case arising out of the \*\*\*Fero case.

3 Mr. Rosenthal, is it?

4 **THE CLERK:** Rosenthal.

5 **MAGISTRATE JUDGE SCHROEDER:** Rosenthal.

6 **MR. LYNCH:** I'm a witness on the \*\*\*Feros case, Judge,  
7 so I'm not involved in that.

8 **MAGISTRATE JUDGE SCHROEDER:** Without any success either  
9 by way of attorneys being conflicted or not available.

10 And it's come down to this, Mr. Thompson.

11 **MR. THOMPSON:** You --

12 **MAGISTRATE JUDGE SCHROEDER:** I would like to assign you  
13 as a member of the Criminal Justice Act panel of attorneys to  
14 undertake the representation of Mr. Rows she know that you  
15 will. It's just a two-defendant case. It's a trafficking  
16 case but it's just two defendants. Because we need to move  
17 it on. It's been pending now for a while and there are  
18 speedy trial rights involved, at least for the codefendant.

19 **MR. THOMPSON:** So, Judge, if I could --

20 **MAGISTRATE JUDGE SCHROEDER:** I will give you a  
21 reasonable amount of time, knowing how busy you are here, but  
22 I've reached the point of desperation.

23 **MR. THOMPSON:** If I could, Judge, I would like to, you  
24 know, thank the Court for its faith in me and accept the  
25 assignment provisionally at the moment. And let me tell you

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1     why, Judge.

2           **MAGISTRATE JUDGE SCHROEDER:**    Sure.

3           **MR. THOMPSON:**    Because there is another case involving  
4     the Feros matter that just resulted in an indictment that may  
5     or may not require the appointment of Capital counsel. By my  
6     count, in this district, there are four -- well, there's six  
7     qualified learned counsel for Capital cases.

8           **MAGISTRATE JUDGE SCHROEDER:**    Right.

9           **MR. THOMPSON:**    Two are in my firm. Two are in  
10    Mr. Harrington's firm but I don't think they're taking  
11    Capital cases. And two have never taken a Capital case.

12           So I think there's going to be a determination very  
13    shortly, like within a week or so, as to whether or not  
14    there's going to be a need for appointment of Capital counsel  
15    in that case. If there is, I'd like to remain available for  
16    that because of the very limited options within this  
17    district. If --

18           **MAGISTRATE JUDGE SCHROEDER:**    Now let me ask this --

19           **MR. THOMPSON:**    Yes.

20           **MAGISTRATE JUDGE SCHROEDER:**    Is that Capital case going  
21    to be one where it's going -- there's going to be a need for  
22    assigning counsel or is it one where there will be retained  
23    counsel?

24           **MR. THOMPSON:**    There would be --

25           **MAGISTRATE JUDGE SCHROEDER:**    Because if it's assigned



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1 counsel, there are the two public defenders in Rochester who  
2 are qualified as learned counsel in a death case. They're  
3 obviously engaged right now in the Gendron case but since  
4 you're indicating this particular Capital case is just at the  
5 embryonic stages --

6 **MR. THOMPSON:** Right.

7 **MAGISTRATE JUDGE SCHROEDER:** -- it may be that those two  
8 public defenders would be available, if it's to be an  
9 assigned case.

10 **MR. THOMPSON:** I think the magistrate judge has been  
11 asked to make a determination within a week or so as to  
12 whether or not there's a need for appointment of Capital  
13 counsel. There are theoretically four Capital defendants in  
14 that case. The government could say we're never going to  
15 pursue Capital prosecution with respect to one or two or  
16 three of those defendants and there might be only one left  
17 out there. Right now, there are four that could qualify.

18 So that's the concern, I guess. I think that's going to  
19 be resolved fairly expeditiously. It's already been  
20 presented to the magistrate and he's asked for further --

21 **MAGISTRATE JUDGE SCHROEDER:** Is that --

22 **MR. THOMPSON:** -- filing.

23 **MAGISTRATE JUDGE SCHROEDER:** Is that in front of  
24 Magistrate Judge Pedersen?

25 **MR. THOMPSON:** McCarthy.

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1           **MAGISTRATE JUDGE SCHROEDER:** Oh.

2           **MR. THOMPSON:** Judge McCarthy.

3           **MAGISTRATE JUDGE SCHROEDER:** Oh, so, it's here?

4           **MR. THOMPSON:** It's here in Buffalo, yes.

5           **MAGISTRATE JUDGE SCHROEDER:** Here in Buffalo.

6           **MR. THOMPSON:** So that's my only reservation, Judge.

7           And I have to look at any potential conflicts. I'm  
8 actually involved in another kind of offshoot of Feros  
9 prosecution but I think it's all by itself. I don't think it  
10 creates a conflict for anything else. I just want to check  
11 it to be sure.

12           **MAGISTRATE JUDGE SCHROEDER:** Certainly.

13           **MR. THOMPSON:** But with those reservations, I'd be happy  
14 to accept it, Judge. I'd just like to figure out if there's  
15 going to be a need for Capital counsel and, if so, I'd like  
16 to be available for that purpose. If that's irrelevant, then  
17 I'm in.

18           **MAGISTRATE JUDGE SCHROEDER:** All right. We have  
19 Mr. Rosenthal on tomorrow.

20           **THE CLERK:** Today.

21           **MAGISTRATE JUDGE SCHROEDER:** Today.

22           **MR. THOMPSON:** You want me to hang around.

23           **MAGISTRATE JUDGE SCHROEDER:** If you wouldn't mind. What  
24 time do we have it scheduled for?

25           **THE CLERK:** 1:30.

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1       **MAGISTRATE JUDGE SCHROEDER:** 1:30. All right.

2       Do we have a bail issue pending?

3       **MR. LYNCH:** Not on this case.

4       **MAGISTRATE JUDGE SCHROEDER:** Okay.

5       **MR. THOMPSON:** Right. Right.

6       **MR. LYNCH:** That's all been resolved.

7       **MAGISTRATE JUDGE SCHROEDER:** I'm sorry.

8       **MR. LYNCH:** That's all resolved.

9       **MAGISTRATE JUDGE SCHROEDER:** It's been resolved.

10       **MR. LYNCH:** Yeah.

11       **MAGISTRATE JUDGE SCHROEDER:** So we've addressed  
12 everything that's pending that needs to be finally addressed.

13       **MR. LYNCH:** Correct.

14       **MR. THOMPSON:** Judge, I had another suggestion. I mean,  
15 this might mess up our schedule, maybe it's a bad suggestion.

16       But you said you wanted to address issues with respect  
17 to Mr. Washington, as well. And I don't know if you want to  
18 address them at the same time along with Mr. Burgin's issues  
19 or you want to do them separately.

20       I'm ordering a copy of this transcript anyway. If the  
21 issues were in the transcript, I'd provide it to Mr. Foti and  
22 he could be prepared to address those issues sooner maybe  
23 than having him come back to court and reviewing those with  
24 him. I don't know. Just my thought.

25       **MAGISTRATE JUDGE SCHROEDER:** Well, I think that's an

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1 excellent suggestion. So let me just make a record of what I  
2 was going to address and Mr. Foti can then be better  
3 prepared --

4 **MR. THOMPSON:** Very well.

5 **MAGISTRATE JUDGE SCHROEDER:** -- for February 9th.

6 As I view the submissions made on behalf of the  
7 Defendant Washington, I concluded these were the outstanding  
8 claims being made by that defendant.

9 One, that the government has not provided Rule 12 notice  
10 to the defendant. That appears at Page 6 of the Washington  
11 submission.

12 Two, that the defendant is "awaiting receipt of digital  
13 data from all cell phones". That also is stated on Page 6 of  
14 the Washington submission.

15 Three, there are numerous suppression motions as set  
16 forth on Pages 8 and 9 and 10, which the defendant states  
17 that five of the suppression motions have been resolved. See  
18 docket 514. And my Report and Recommendation with respect to  
19 the search of the Washington Cadillac which I had recommended  
20 suppression of evidence and the 56 Grimes Street search.

21 The fourth issue is the search of the Ford Ranger  
22 automobile of Mr. Washington at 69 Bennett Village. I did  
23 hold an evidentiary hearing on that and I did submit a Report  
24 and Recommendation recommending denial of the defendant's  
25 motion. It all centered on the issue of consent as to

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1 whether consent had been validly given by Mr. Washington to  
2 the special agent when they were sitting in a car outside of  
3 69 Bennett Village.

4 The fifth claim, as I understand it, is the defendant  
5 says that there are presently pending five motions. That's  
6 found on Page 15 of the submission which relate to the  
7 February 2020 searches, that three of those motions relate to  
8 real property -- which I'm assuming he meant houses or  
9 residences -- and two motions relate to the cell phones that  
10 were seized from 69 Bennett Village. The further claim of  
11 the Defendant Washington is that the three property searches  
12 are all based on the events that occurred at 56 Grimes on  
13 February 19th, 2020, and, therefore, those subsequent  
14 searches being based on the Grimes events were really  
15 products or fruits of a poisoned tree. That's basically set  
16 forth on Page 16 of the submission.

17 The question I raise, as I previously did at the start  
18 here this morning, is it appears to me that Defendant  
19 Washington is attempting to vicariously adopt the Fourth  
20 Amendment rights of the Defendant Burgin by claiming that 56  
21 Grimes was a violation of the Fourth Amendment, albeit a  
22 violation of Mr. Burgin's rights; nevertheless, that  
23 violation poisoned the tree which produced fruit for the  
24 search at properties in which Mr. Washington had an interest  
25 and, therefore, applying the principle of the fruit of the

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1   poison tree, those searches are invalid. And that's set  
2   forth, once again, on Page 16 of the submission.

3           And then Defendant Washington also raises the claim that  
4   there was delay in getting the search warrants for all of the  
5   cell phones that were seized in which Mr. Washington had an  
6   interest. And that raises the issue that I've previously  
7   addressed here this morning of the *Smith* case and the concept  
8   of the cell phones being considered instruments or tools of  
9   criminal activity per se, and, therefore, there's a  
10   difference in that context from those phones and what the  
11   factual situation was in the *Smith* case.

12           In *Smith*, as I understand it, there was the vehicle and  
13   traffic stop made on the New York State Thruway by the state  
14   trooper and during the course of that vehicle and traffic  
15   stop, the trooper noticed what I'll call an iPad or a tablet  
16   and had some question or issue about what was contained in  
17   that, whether there might be some kind of contraband and  
18   that, as a result, Smith was taken to the trooper barracks  
19   and the tablet or the iPad or the device was seized -- or the  
20   device was seized.

21           And the sole purpose, as the Court found, for the taking  
22   of the device was to determine whether there was evidence of  
23   criminal activity involved, had nothing to do with the  
24   vehicle and traffic charge. And, therefore, if that was the  
25   purpose of seizing that, coupled with the fact that in this

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1 day and age, electronic devices contain our entire lives in  
2 most instances by what we store on them.

3 There was a question as to whether the authorities were  
4 diligent in undertaking the application for a search warrant  
5 authorizing the search of that device and, if they were not,  
6 then the evidence taken from the device should be suppressed.

7 And it was in the *Smith* case, then, that the presumption  
8 of failure to take diligent action was created, using a time  
9 period of 31 days, under those facts.

10 So that's what I'm anticipating Mr. Foti to address.

11 **MR. THOMPSON:** One other CJA matter, Judge, in order to  
12 expedite our schedule here and hopefully comply with our  
13 schedule, can I have authority to request an expedited  
14 transcript?

15 **MAGISTRATE JUDGE SCHROEDER:** I have no hesitancy to  
16 grant that. I just don't know if there's any kind of freeze  
17 because of the budgetary problems.

18 **MR. THOMPSON:** Okay. I'll request it. The problem --

19 **MAGISTRATE JUDGE SCHROEDER:** If it's available that way,  
20 I'll authorize it.

21 **MR. THOMPSON:** Okay, very well.

22 **MAGISTRATE JUDGE SCHROEDER:** I just don't know if the  
23 Congressional budgetary situation has put any kind of a hold  
24 on those kinds of expenditures.

25 **MR. THOMPSON:** My concern is if it's not expedited,

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1 we're not going to have it before February 9th. So I'm going  
2 to try to get it as quickly as I can.

3 **MAGISTRATE JUDGE SCHROEDER:** I understand. All right.

4 Thank you, everyone.

5 (WHEREUPON, proceedings adjourned.)  
6  
7

8 \* \* \*

9 **CERTIFICATE OF TRANSCRIBER**

10  
11 In accordance with 28, U.S.C., 753(b), I  
12 certify that this is a true and correct record of proceedings  
13 from the official audio recording of the  
14 proceedings held in the United States District Court  
15 for the Western District of New York before the  
16 Honorable H. Kenneth Schroeder, Jr. on January 25, 2024.  
17  
18

19 S/ Diane S. Martens

20 Diane S. Martens  
21 Transcriber  
22  
23  
24  
25